

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SUSAN KANGAS)	
Claimant)	
VS.)	
)	
KANSAS CHRISTIAN HOME, INC.)	Docket No. 205,230
Respondent)	
AND)	
)	
WAUSAU UNDERWRITERS INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund requests review of the Award of Administrative Law Judge Bruce E. Moore dated August 26, 1998. In the Award, the Administrative Law Judge granted respondent's request for reimbursement from the Kansas Workers Compensation Fund, finding the Workers Compensation Fund responsible for 75 percent of claimant's care, treatment and permanent impairment stemming from the April 4, 1994, accidental injury. Oral argument was heard April 9, 1999, in Wichita, Kansas.

APPEARANCES

Claimant appeared not, having settled her claim with respondent in this matter. Respondent and its insurance carrier appeared by their attorney, Christopher J. McCurdy of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, E. Thomas Pyle, III, of Hutchinson, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board.

ISSUES

- (1) Was the Workers Compensation Fund (Fund) prejudiced from respondent's late impleading of January 12, 1996, prior to the February 6, 1996, settlement hearing?
- (2) Is respondent's claim against the Fund barred by the stipulation between claimant and respondent, at the settlement hearing, that claimant suffered personal injury by accident on April 4, 1994, and each and every working day thereafter?
- (3) What is the date of claimant's right shoulder injury?
- (4) Was claimant a handicapped employee prior to April 4, 1994?
- (5) Did respondent have knowledge of claimant's alleged handicap prior to April 4, 1994?
- (6) Did claimant's alleged handicap cause or contribute to claimant's current injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant began working for respondent in July 1992, as an LPN, working the night shift. Claimant's responsibilities included night shift supervisor in the nursing home facility. Between October 24, 1992, and April 4, 1994, claimant suffered several injuries to her right shoulder. Claimant's first shoulder injury occurred on October 24, 1992, while claimant was transferring a patient from a wheelchair to a toilet. Claimant described a pain sensation in her right shoulder. Claimant stated that there was some problem with her shoulder at that time. She rested her shoulder, took anti-inflammatory medication and after approximately two weeks, the problem resolved. She missed no time from work.

Claimant next injured her shoulder in July 1993 when claimant and a nurse's aide were getting a resident out of bed. The resident, who weighed approximately 200 pounds, was sitting on the bed and started to fall over. Claimant grabbed him with her right arm, to keep the resident from striking his head, and again injured her right shoulder. Claimant described the sensation as a burning sensation in the shoulder. An incident report was prepared by respondent and an accident investigation report was also prepared. Claimant

recalled filling out the incident report. Claimant missed no work and sought no treatment at that time. Claimant did, however, receive medical treatment on September 1, 1993, at the McConnell Air Force Base clinic.

Respondent was aware of the problems associated with the claimant's shoulder, and the respondent's director of nursing requested that claimant use larger clothing on the resident and also directed that claimant seek assistance from another staff member whenever dressing this particular resident.

Claimant next suffered injury to her right shoulder on December 11, 1993. At that time, claimant was assisting a resident, who was unable to pivot, and injured her shoulder. Claimant advised respondent she intended to seek treatment December 14, 1993. However, no records from that medical treatment are in the record. Respondent did advise claimant that she was to use two staff persons to transfer residents thereafter. Dana Froelich, respondent's executive director, advised claimant that he was concerned about future injuries, which is why he requested the two to transfer procedure be implemented.

Claimant was again injured on December 23, 1993, while transferring a resident from a wheelchair with the assistance of a CNA. At that time, the resident began slipping off the edge of the bed, and claimant had to lift the resident up onto the bed. Claimant experienced a sensation in her right shoulder, which she described as a knife-like pain. Claimant was again treated with anti-inflammatory medication and pain killers. The director of nursing advised her, at that time, instead of resisting the fall, to try to ease the resident to the floor. Claimant was also provided a note from the director of nursing, instructing her to use a mechanical lift from that point forward in order to avoid additional injury. Mr. Froelich implemented the protections requiring claimant to use assistance, including both other employees and the mechanical lift, because he was trying to avoid further injury to claimant. Mr. Froelich was concerned that claimant was at risk for further injury because he felt that there was some weakness or something in the shoulder that caused him concern.

On April 4, 1994, claimant reinjured her right shoulder and neck while trying to lift a resident without assistance. Claimant again treated with the air force base doctor and, on that occasion, was referred to an orthopedic surgeon. Claimant was restricted from lifting weights greater than 10 pounds.

Claimant noted that, after the December 1993 injury, she restricted using her right shoulder because of muscle weakness. Her shoulder seemed prone to injury. When attempting to lift someone, she tried to use the other shoulder to avoid additional injury. She discussed this with her supervisor and with other workers, whom she asked for assistance. Claimant's immediate supervisor, at that time, was Connie Hebert. However, Ms. Hebert did not testify.

Claimant acknowledged that there were five injuries to her right shoulder between October 1992 and April 1994. Claimant described each of the injuries as being in the same part of her shoulder, that being the front part of her shoulder in the joint area.

Claimant also received treatment at Tinker Air Force Base in Oklahoma City, Oklahoma, but again no medical records are available from that treatment. Claimant went to both McConnell Air Force Base and Tinker Air Force Base, because she could get the medical treatment at no cost. Claimant identified Dr. Sayeed at McConnell Air Force Base, Dr. Mason at Tinker Air Force Base, and a physical therapist by the name of Burgess at McConnell. Again, none of these records were made available for the purposes of this litigation.

After the April 1994 injury, claimant babied her shoulder, believing that she had just sprained it. She took anti-inflammatory medication and performed mild exercises. However, she was having difficulty lifting objects away from her body, and any lift over shoulder level became quite painful. While she was able to use the right arm during that time, claimant lifted no heavy objects after the April 4, 1994, injury. She does not believe that her work caused any further injury to her shoulder after April 4, 1994.

Claimant continued working for respondent until September 15, 1995. Claimant was taken off work by Dr. Mason for approximately two weeks on September 25, 1994. Claimant did acknowledge that the pain in her shoulder increased after April 1994, even though she restricted her activities.

Dr. Pedro Murati, a board certified physical medicine and rehabilitation specialist, was deposed on June 4, 1998. Dr. Murati had never had the opportunity to examine claimant, but did examine all of claimant's medical records. He felt the injuries before December 1993 were insubstantial. He described the earlier injuries as being more a strain than a sprain. A sprain was described as being a ripping or tearing of the fibers, which is essentially what occurs with a rotator cuff tear. He did not believe the earlier injuries were consistent with a rotator cuff tear. However, he felt the December 1993 injuries were significantly more serious. He believed that, in December 1993, claimant tore her rotator cuff, resulting in permanent impairment. He opined that the injuries in December 1993 placed claimant at a disadvantage in retaining her employment as an LPN. When discussing the April 1994 injury, he described it as being the last drop that spilled the drink, and went on to state that the December 1993 accidents predisposed her to that injury. Dr. Murati testified that the April 1994 injury would not have occurred but for this December 1993 rotator cuff tear. He did not find this to be a cumulative trauma injury, but rather a series of five specific traumas sustained by claimant over a period of time.

Dr. Murati did state that claimant sustained some permanent impairment as a result of the 1993 injuries and, based upon his experience, estimated that approximately

25 percent of her current impairment would relate to the preexisting condition. He also stated that he did not believe the level of work performed by claimant after April 4, 1994, through her last day with respondent was enough to cause any additional or continuing injuries. The 1993 rotator cuff tear, while it healed, did not heal 100 percent and definitely predisposed her to the April 1994 injury.

Claimant was examined by Dr. J. Mark Melhorn on October 4, 1994, for complaints to the right shoulder, including decreased range of motion. Surgery was performed on claimant on February 15, 1995, involving a right shoulder rotator cuff repair and acromioplasty with acromioclavicular ligament release. Claimant went through physical therapy and rehabilitation following the surgery, and was released back to work on May 26, 1995.

Dr. Melhorn agreed with Dr. Murati that claimant suffered a specific traumatic injury on April 4, 1994, rather than a series of injuries. He also acknowledged claimant's previous episodes of pain in 1993. He stated that it would be difficult to consider claimant handicapped prior to April 4, 1994, based upon her ability to perform her work activities and based upon the fact that there were no notes from any health care providers restricting claimant's work activities. He did, however, agree that the number of injuries sustained by claimant definitely placed her shoulder at greater risk of injury due to the preexisting condition. He acknowledged that claimant's previous episodes of pain warranted both treatment and a modification of her activities. While he noted that claimant's symptoms did worsen after April 4, 1994, he did not know whether claimant's work activities caused any further injury after that date. He felt the April 4, 1994, incident was a specific traumatic event, and there was a definite causal relationship between the four prior injuries sustained and the April 4, 1994, injury. While he did not believe claimant was a handicapped employee before April 4, 1994, he felt it was possible she was functioning at less than full capacity. Dr. Melhorn was uncertain whether that warranted that claimant be considered a handicapped employee under the "current" definition.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish her right to an award of compensation by proving the various conditions upon which her right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g).

KS.A. 44-567(a) states in part:

An employer . . . who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be

relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:

(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury which occurs prior to July 1, 1994, and the administrative law judge awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers compensation fund;

. . . .

(d) An employer shall not be relieved of liability for compensation awarded nor shall an employee be entitled to an apportionment of the costs thereof as provided in this section, unless the employer shall cause the commissioner of insurance, in the capacity of administrator of the workers compensation fund, to be impleaded, as provided in K.S.A. 44-566a and amendments thereto, in any proceedings to determine the compensation to be awarded a handicapped employee who was injured or disabled or has died, by giving written notice of the employee's claim to the commissioner of insurance **prior to the first full hearing where any evidence is presented on the claim.** (Emphasis added.)

The Fund contends that it has been prejudiced due to the lateness of the impleading in this matter. The Fund was impleaded on January 12, 1996, prior to the settlement hearing of February 6, 1996. The Appeals Board notes that, under K.S.A. 1998 Supp. 44-555c, a review by the Board is upon questions of law and fact as presented, had and introduced before the Administrative Law Judge. It is noted this issue was not raised to the Administrative Law Judge at the time of the regular hearing, and was not decided by the Administrative Law Judge in the Award. The Appeals Board would, therefore, find that this issue cannot be brought before the Appeals Board, as it was not considered by the Administrative Law Judge.

Arguendo, even if this matter were to be considered by the Appeals Board, K.S.A. 44-567 requires an impleading prior to the first full hearing where any evidence is presented on the claim. The Fund was impleaded in this matter on January 12, 1996, before the settlement hearing of February 6, 1996, and substantially before the regular hearing of May 7, 1998. The Fund's representative was present at the time of the settlement and had the opportunity to question claimant at that time. In addition, claimant's deposition was taken on May 29, 1997, at which time the Fund was represented, and took the opportunity to question claimant at length regarding her injuries and the issues in

contention before the Administrative Law Judge. If this issue were before the Board, the Fund's claim of prejudice is unsupported by the record, and the Fund's request to be dismissed would be denied.

The Fund contends that the appropriate date of accident in this situation is after July 1, 1994, based upon the evidence and based upon the stipulation between claimant and respondent at the settlement hearing. The accident described by claimant on April 4, 1994, is a specific, one-time traumatic event. While claimant acknowledged her shoulder continued hurting and may even have hurt worse after April 1994, claimant did restrict her own activities during that period of time, and acknowledged suffering no additional injury to her shoulder during that period.

Both Dr. Melhorn and Dr. Murati had the opportunity to visit this question. Neither could find that claimant suffered significant injury after that date. Dr. Murati went on to say that he did not believe this to be a cumulative trauma disorder, but rather a one-time injury. Dr. Melhorn indicated that, while claimant suffered continuing symptoms, she had a definite traumatic event on April 4, 1994. He believed her symptoms with regard to the right shoulder were a combination of both microtraumas and a specific traumatic event on April 4, 1994. He does not, however, testify that claimant suffered additional trauma after the April 4 incident. The Appeals Board, therefore, finds claimant suffered accidental injury on April 4, 1994, and that is the appropriate date of accident to be used in this instance. The record does not support a finding that the parties entered into a binding stipulation for an accident date after July 1, 1994, nor was the Fund a party to any such agreement.

The Appeals Board further finds that claimant was a handicapped employee before April 4, 1994. Claimant described several injuries to her right shoulder preceding the April 4 incident. Claimant sought medical treatment at both McConnell and Tinker Air Force Bases for the shoulder injuries. While the medical reports were not placed into evidence, claimant did testify to ongoing difficulties with the shoulder. Claimant further testified that she both self-limited her activities and was instructed by her supervisor to limit her activities with the shoulder. In addition, respondent provided the testimony of Dana Froelich, its executive director, regarding the instructions provided to claimant about obtaining the assistance of coworkers when doing any lifting and ultimately using a mechanical lift to perform any lifting activities involving residents. These restrictions were implemented because respondent felt there was something going on in claimant's shoulder, some weakness or some injury, and they were concerned about future injuries. Claimant acknowledged that her right shoulder, especially after the December 1993 injuries, was weak and she was unable to perform the activities in the same fashion as she had before that injury. The Appeals Board, therefore, finds that claimant was a handicapped employee prior to April 4, 1994, and respondent had knowledge of this handicap.

Finally, the Appeals Board finds that claimant's alleged handicap did cause or contribute to claimant's current injury and disability. Both Dr. Melhorn and Dr. Murati testified to this issue. Dr. Murati felt that claimant's April 1994 injury would not have occurred but for the December 1993 injuries to claimant's rotator cuff. While he went on to provide an opinion regarding the percentage of impairment of the December and April injuries, his "but for" testimony was concise. Dr. Melhorn, on the other hand, would not testify that, but for the preexisting problems, claimant would not suffer the April 1994 injury. He did, however, acknowledge that the injuries suffered by claimant prior to April 4, 1994, put claimant's right shoulder in a position where it was at greater risk of injury. Dr. Melhorn was reluctant to state that claimant was a handicapped employee, primarily due to the fact that he had no notes from physicians restricting her work activities prior to the April 4, 1994, accident. However, the Appeals Board finds that the testimony of claimant, coupled with the fact that she was treated on several occasions at two different military bases, is sufficient evidence on this issue.

The Appeals Board further finds that the testimony of Dr. Murati is more credible than that of Dr. Melhorn regarding what contribution claimant's handicap may have played in the current April 4, 1994, injury. As Dr. Murati was emphatic in his but for testimony, the Workers Compensation Fund should be responsible for the entirety of this award.

Therefore, the Award of the Administrative Law Judge shall be modified to reflect a 100 percent award against the Kansas Workers Compensation Fund, but is otherwise affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated August 26, 1998, should be, and is hereby, modified, and respondent shall be granted an award against the Kansas Workers Compensation Fund for 100 percent of claimant's care, treatment and any permanent and temporary impairment suffered by claimant, as well as all costs associated with this award.

The fees necessary to defray the expense of the administration of the Workers Compensation Act were hereby assessed against the Workers Compensation Fund to be paid as follows:

Rachelle Smith, C.S.R.

Settlement Hearing Transcript

\$ 35.00

Court Reporting Services

Deposition of Susan Kangas	\$235.00
Deposition of Dr. Pedro Murati	\$193.40

Patty L. Morton, C.S.R.	
Deposition of Dana Froelich	\$186.50
Deposition of Dr. J. Mark Melhorn	\$150.20

Owens, Brake, Cowan & Associates	
Regular Hearing Transcript	\$ 71.98

In all other respects, the Award is affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Christopher J. McCurdy, Wichita, KS
E. Thomas Pyle, III, Hutchinson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director